SECTION IV.—OF THE ACQUISITION OF LAND FOR PUBLIC PURPOSES.

§ 1.—*Object of the Law.*

It is a general maxim that private right has to give way where the public welfare demands it; but under any ordinary circumstances, if the public welfare demands that private property be converted to a public use, a fair and full compensation must be given.

It is necessary that this subject should be dealt with by law, *first*, because we want it to be settled what *is* a "public purpose" and who is to be the judge of the necessity for acquiring the land; and next, because when the question of compensation comes up, there are various interests requiring to be kept in due restraint. For instance, there is the temptation to the owner to put an extravagant price on his property, and the probable inclination on the part of the jury or arbitrators, to be over-liberal in awarding payment which will come out of the Government treasury, whereas in truth, as the money paid comes out of the public pocket, it is the more particularly necessary to see that while the owner is fairly treated, the public is not overcharged.

Again, in connection with the grant of compensation arises the important question, what *is* a fair amount? what circumstances giving value to the property ought to be taken into consideration, and what excluded? I may have a private garden, which I would not sell for ten times its market value; am I to be allowed anything for the loss as it affects my feelings, or am I only to get the market value? Lastly, what is the best procedure to adopt for hearing and deciding claims? These and such like matters are, therefore, settled in all civilised countries, by law. In India they are now provided for by the Act X of 1870, "The Land Acquisition Act." It is of general application and is extended to Berâr[2].

[2] Notification of 4th July 1870. Note to Legislative Department edition of the General Acts.

The term "land," it is to be borne in mind, includes benefits to arise out of land and things attached to the earth or permanently fastened to anything attached to the earth.

It must, therefore, include houses[3], rights of occupancy in land, rights to a water-course, to pasture, and to jungle produce, &c., &c.

§ 2.—*Procedure.*

By section 4, the Local Government may issue a notification that certain land is *likely* to be required. When the notification is published, power is given to the proper officer to examine the place, survey, dig or bore into the soil, and do all other acts necessary to ascertain whether the land is adapted for the purpose. He may place marks to indicate boundaries, levels, &c., and if *necessary*, he may cut crops or clear away jungle. But compensation for such preliminary acts has to be made.

When it is determined that land *is* required either for Government or for a Company (registered in India or constituted by Act of Parliament or Letters Patent), a declaration to that effect is made by Government under the signature of a Secretary or some officer authorised to certify the orders of Government. The declaration, when made according to law, is conclusive proof of the public necessity, and that the purpose is a public one[4]. The declaration has to be published in the Official Gazette, and must state the district or other territorial division in which the

[3] The Act requires that if a house, building, factory, &c., be taken, it must all be taken if the owner so requires—not merely a part (see section 55). The Act only applies to land and things on it, for the occasion can really never arise that Government should require to take people's movable property.

[4] The Forest Act VII of 1878 expressly declares that if land is wanted for a timber depôt, a plantation, or for any of the purposes of the Act, this is to be deemed a public purpose (section 83). Such a declaration is, perhaps, hardly necessary, since the Land Acquisition Act itself makes the declaration of Government that the land *is* wanted for a *public purpose*, final; so that if Government were to judge that any purpose whatever was a public purpose, and to make the declaration accordingly, there would be no calling the declaration in question (section 6). Where land is wanted for a *Company*, there are certain conditions to be fulfilled, for which the Act must be referred to.

declared by Act VIII of 1873. *Navigation* is also provided for, and tolls on rivers are levied by public authority (*e.g.*, Act I of 1867, North-West Provinces). *Ferries*, when they are of a public nature, and not merely crossing-places used by individuals or the inhabitants of a village, are also regulated by public law[8]. Government, under the Forest Law, also asserts the right of control of rivers and their banks, or so far as concerns the transport of timber.

SECTION III.—STATE RIGHT IN WASTE LANDS.

§ 1.—*Origin of the right.*

Students of the *Revenue Manual* will recollect that one great feature in all land-revenue settlements is the recognition of a proprietary right, or at least of a heritable and transferable right of occupancy, in land.

But in all cases this went no further than the land which was really and fairly *in possession*: it did not extend to the whole area of the district or province, part of which, at least, was not in practical possession of any individual or community.

It is true that there may have been in many cases a *de facto* possession of land not actually brought under cultivation; and although the ascertainment of the fact of possession might be in such cases attended with difficulty[9], still the Settlement Officers found means to determine the matter practically and equitably, if not on any very definite theory.

the purpose), or erecting spurs and works to regulate the flow of the water and maintain the channel, &c. But there are many cases in which private rights exist in the soil over which a river may be running; and perhaps such rights may extend over the whole bed.

[8] See Act XVII of 1878 for Northern India; Regulation VI of 1819, and Bengal Act I of 1866; Bombay Act VII of 1879; Act II of 1873 for Burma; Madras Act I of 1873.

[9] Because it is by no means true that you acquire such a hold over waste land that you ought to be recognised as proprietor, by merely using its surface products, as, *e.g.*, by letting cattle graze, taking leaves for manure, or even cultivating portions of it for a short time only. The principle involved was fully discussed in the last chapter.

But whether it was actually cultivated land or not, our law only professed to recognise a right resulting from *actual possession*. Of all other land, there can be no doubt that Government is, by law and by ancient custom, the proprietor. The Native Governments always and uniformly asserted this. From the earliest times the Hindú Rája owned the waste. A strong customary title arose in land in favour of the clearer or occupier: but what was uncleared remained to the Rája; he gave his grant or "birt" for its occupation, and he derived revenue for the jungle produce as long as it was unoccupied. If a grantee or a village headman, or a family group of landholders, got the full right (what we should now call in India, the zamindárí right) over a defined area, the grant specifically included the waste and woodland which was situate within that area. Nor was this right in the land altered by the advent of the Mughal rule[10]. The State, as before, made grants of waste land; and in such cases the grantee was always held, in after times, to have one of the most indisputable titles; because it was certain he had not dispossessed any one else. Whenever the Government granted the right of collecting revenues over an entire area of land to a "zamíndár" or other person, such grantees always had the right of disposing of the *waste* portions of their grants as they pleased, and this was distinctly in virtue of the State right which was conceded to them.

§ 2.—*The right declared by law.*

This right has descended to the British Government. Not only is it practically assumed in all cases where Rules for settle-

[10] In the Kanara case (I. L. Rep., Bo. High Court, vol. III, pp. 583-4), Mr. Justice West (in considering whether the plaintiff had established a claim on the waste) said that under British rule "the principle from which we must start is that waste lands belong to the State." By Muhammadan law, it was observed, waste which had not been obtained by a proper application or an engagement to cultivate, remained the property of the State; and although it is possible that by *acquiescence* the Government might have allowed a private title to *grow up*, it must be acquiescence in what was, on the face of it, a *permanent* occupation of the land, not a mere casual use of it. It is exactly on this principle that the Regulations of 1819 and 1828 proceed.

ment have been made, determining what amount of waste shall be, and what shall not be, included in private estates, but it is expressly declared in some of the earliest Regulations made for Bengal, in which province our first direct dealings with the land as a Sovereign Power, began. Thus in Regulation III of 1828[1] mention is made of extensive tracts of country "unowned and unoccupied at the time of the perpetual settlement which are now liable to assessment, *or, being still waste, belong to the State.*" Besides the declaration in the Regulation of 1828, there are numerous other declarations in more modern Acts, which either express or directly imply the Government ownership of all waste land.

The preamble to the Waste Land Rules of Oudh (1865,)[2] though not law, still publicly and authoritatively asserts, as a fact, that "under the Native Government all unassessed waste lands in the province were held to be the property of the State," and that the "right has devolved on the British Government and been recognised and acted on by it since annexation."

The North-West Provinces Land Revenue Act makes a declaration of Government right in all waste not included in any private estate[3]; the Bombay Code does the same[5] and the Panjáb Act[4] makes, by direct implication, a similar claim. If it is asked why a specific declaration was not repeated in the Act XXIII of 1863, which specially provides for settling "Claims to waste lands," it may be answered that that Act was passed when a large proportion of the provinces had already come under settlement, so that there was

[1] *Section 1, clause* 2.—These terms are quite general, although later on in Regulation the same assertion is repeated with special reference to the Sundarbans of Bengal.

[2] Notification of Government of India, May 25th, 1865.

[3] Act XIX of 1873, Section 58.

[4] See Section 37 of Bombay Act V of 1879.

[5] Act XXXIII of 1871, Section 28; compare also Act IV of 1872, Section 48. The subject is not mentioned in the Oudh Act, because the question was disposed of, and the waste cut off that was not to belong to the estates settled before settlement began. So in the Central Provinces; the Act only takes notice (section 154) of claims regarding waste land that had been disposed of at settlement, to bar them after three years from date of settlement.

no express occasion to declare it; moreover, as the object of the Act was specially to protect possible rights and claims of private persons over waste from being over-ridden in effecting Government sales and leases of such lands, it was not the place in which to repeat such a declaration.

The right of Government to all waste land not owned or occupied in practically proprietary right, may then be taken as quite beyond dispute.

§ 3.—*Allotment of waste to villages.*

The detailed history of the disposal of waste at settlement, in the different provinces, will be found in the *Revenue* Manual: here I. may just indicate that, in pursuance of this right, the Government disposed, at or before the settlement, of whatever questions existed about the ownership of the waste. In the North-Western Provinces the waste was in most districts found to be included in the known area of village estates. It was accordingly conceded to them, and so recorded. In the rest of Upper India, it was not so, and Government then granted to, or included in, each estate, a convenient area of waste, both for use as pasture land and to allow for the due expansion of cultivation.

Under the settlements of Bombay (including Berar) and Madras, in which the Government deals with individual holdings and levies its assessment on them, waste is differently treated. It may either (1) form small plots numbered in the survey, and available to be cultivated; or (2) form larger plots of "unassessed waste," or (3) may lie in great jungle tracts or hill ranges, which are separate entirely from the country which the survey has dealt with for revenue purposes. Grazing ground and jungle (to be kept as such) may have been given over to the villages; but no large area of waste for additional cultivation is added as under the village system, because the settlement does not deal with villages but with individual holdings, and the waste, whether assessed or not, lies there at the disposal of Government. Anybody, however, is at liberty to apply for it and get

a right of occupation, on the sole condition of using it for the purpose for which it is conceded and paying the assessed revenue. But no one can take up such waste without a due and proper permission, and the law renders any unauthorised appropriation penal.

In Bombay, under the present survey system, there is no possible doubt as to what is waste at the disposal of Government and what is not.

Under the Madras system the question of the waste is by no means so clear[6]. Nor is unauthorised appropriation of waste prohibited, except by the levy of a somewhat higher rate of assessment. In cases where the survey has not come (and there are many), the distinction between waste at the disposal (to some extent) of the State and occupied land, is ill defined, and there would probably be some difficulty in saying what was waste and what was not.

In the sequel, I shall be understood to speak only of the waste *which was not included* as part of a village or a privately-owned estate, and which, consequently remains, generally, at the disposal of Government.

With regard to this waste area which, in several provinces, is of enormous extent and great capabilities, there have always been two important interests to be consulted. One is the reservation of a sufficient portion of the waste as State or village forest for timber, for fuel, or for grazing ground; the other is the due extension of cultivation and the consequent increase of revenue and progress of civilisation generally; for civilisation always progresses along with cultivation, which itself implies new roads, the building of new villages, diminishing the domain of dangerous wild animals, and augmenting the means of subsistence for a growing population.

[6] At the time I am writing, the question is under discussion. At one time the view was advocated in Madras that the waste belonged to the villages—how, or on what principle was not clearly said. Possibly it was only meant that the villages had strong claims to rights of user in the jungle. It will probably require a careful local examination and a classification of the waste into (1) what is suitable for State forests, (2) what should be formed into village forests, (3) what should be left for grazing land, or for extension of cultivation, before the waste question will be practically set at rest.

§ 4.—*Waste Lands Minute (1861) and Rules.*

Both objects were fortunately well kept in view when Lord Canning wrote his famous Minute of 1861[7]. Before that time, the various provinces had each a procedure of their own for making grants of waste; and sometimes these grants were rather to be deplored than otherwise. But it was in 1861 that the subject first came prominently to notice and took definite shape. Under the orders then issued by the Government of India, the local Governments in every province were directed to prepare revised rules for the *sale of waste lands* on favourable conditions.

The local Governments were, however, directed to exclude from the list of lands available, those which were likely to be wanted for public or other special purposes, such as grazing grounds, forest lands, or fuel reserves, or sites of stations or for building lots; this done, all other waste lands might be sold without reserve.

In the *Panjáb, North-West Provinces* and *Oudh*, the rules clearly specify the principle on which waste is available for sale or lease.

In *Bengal* the rules expressly define the waste which is available to be brought under cultivation so as not to include land wanted for forests[8], or for grazing grounds or for fuel reserves, and wisely reserve also, a strip 60 feet wide on either side of every considerable public road (in cases where such roads pass through land available for granting out).

In the *Burma* rules a list of places likely to be wanted, and therefore not available for sale, is given.

In *Berar* the rules have been quite recently revised[9]. In this province the settlement system being "raiyatwári," the districts generally, excepting the Melghát hill-tract, were surveyed and

[7] Resolution (Government of India) No. 3426 of 17th October 1861.

The Secretary of State in 1862 modified these orders so far as concerned the proposal to fix an uniform price for land, but otherwise they were approved of.

[8] See Whinfield's Revenue Hand-book, Bengal (Calcutta, 1874), p. 227. It is usual in most places, when any large area of waste is to be disposed of, to consult the Forest Department as to whether the land is likely to be useful for forest purposes, before it is offered for sale, &c.

[9] Resident's Book Circular XXIII of 1880.

parcelled out into revenue-assessed fields or "numbers;" but even then, whenever there was an available area of waste of any extent, that waste was thrown into large blocks under one number, so that a whole area known by one local name would often form a single group or a "waste village." This occurred almost exclusively in the Wún and Basim districts, to which the rules now apply. Casual waste plots in the midst of settled villages are not dealt with under the Waste Land Rules, but under the ordinary revenue rules. The Rules are (as usual) expressly declared not to apply to any forest reserves; and not only so, but if a waste block put up for lease contains valuable timber, the part containing such timber is understood to be excluded from the terms. In all cases "mohwa," "mango," and "tamarind" trees must be left standing in clearing the land for the plough. In other respects the lessee has a right to enjoy the forest produce of the uncultivated parts of his lot, but must submit to any rules about "passes" for produce taken for export or sale beyond the limits of the village or area leased. There are various other details in the Berar Rules different from what are found in other provincial rules, partly because such matters find a place rather in the Revenue Acts and Rules of these provinces, and partly because the land system is different.

These various rules, however, all agree in this, that they apply to tracts not cultivated, and which Government desires to see settled and cultivated; they expressly exclude those tracts which Government desires to keep for other purposes, and notably for forest and grazing land.

The Rules also describe the method in which notice is given of the intention to lease or sell; how the plots are to be surveyed; how people may apply for plots before they are, or without their being, advertised for sale; how the purchase-money is to be paid; and what are the conditions of sale, and so forth.

There is no occasion for the student to go into details on the subject. All rules before 1861 were of course called in and revised; and now (with the exception of any rules newly issued or amended since 1868) all the existing rules may be found in a col-

lection printed by the Government of India in the Home Department in 1868.

Of late years the 'sale' of waste land in 'fee simple' as it was (unfortunately) called, has been stopped; the present method of disposing of waste lands, is to issue 30 years' leases, which are put up to auction at an upset price, and certain progressive revenue-rates are fixed. At the end of 30 years, a permanent title is acquired, subject to payment of the ordinary land revenue, and to certain other conditions.

§ 5.—*Claims to right in waste lands.*

In order to prevent any inconvenience which might arise from claims being made by private persons in respect of lands offered for sale or lease, an Act was passed for the speedy adjudication of such claims by special procedure[10].

It is not necessary to refer to the details of the Act for the purposes of this section; as a matter of fact, I believe its provisions have been little, if at all, called into play. The Land Revenue settlement usually disposed of all claims to waste in which there was any real question of private interest, and the great tracts of waste in the hill ranges and remoter parts of the country, which were available for settlers, were not likely to be subject to claims on them of a nature which the Act would apply to. I never heard of a case under the Act in the Panjáb; but I cannot speak so confidently of other provinces.

§ 6.—*Right to the waste enables Government to form State forests.*

A very important consequence flows from this general right of the Government to unoccupied waste, and from the care which has been taken not to alienate all the waste exclusively in the interest

[10] Act XXIII of 1863. It may be asked whether this Act might not be applied to settling claims in the case of lands taken for forest purposes; but I think it only applies to cases where the land is *about to be sold* to private persons; moreover, as the Forest law provides a procedure expressly for dealing with claims to rights of user or interest of any kind in lands to be placed under the forest régime, it is evident that the special Act would govern the procedure even if the other were technically applicable.

of cultivation. It is this, that practically, as far as the provinces directly under the Government of India are concerned (and in Bombay also), the general right in question has been found *to be a sufficient basis for a* Forest Law. In other words, the right of Government in waste land, has been found, as a general rule, sufficient to enable Government, without real hardship to any one, to constitute a large area of State forests for the public benefit. All the public forests, I may say, in India, were originally uncultivated "wastes," whether in the hills or plains, whether naturally "forest" or mere scrub or barren land improved by closing or artificial planting; and the right to place these under the forest *régime*, depends, in the first instance, on the general right above indicated.

Nor was it necessary that the right of Government should be absolute,—that is to say, unrestricted by rights of user. In some instances the Government had not taken sufficient notice of the subject, in former days, to have maintained an unburdened right in the waste; it had let rights of user grow up, and consequently had its own right limited thereby; it had only retained, in the eye of the law, something less than an absolute or full property, and therefore some forest consists of lands in respect of which Government is obliged to recognise other rights besides its own.

But in such cases the *property in the land* itself, remains to Government, though certain rights of user belong to the people, and consequently the estate can be made a forest, though the common rights of the people have to be fully provided for or bought out, by the various means which it is the business of the Forest Law to define and prescribe.

There have been also cases in the Panjáb, and possibly in other places, where the Government have distinctly recognised a right in, or granted away, all the waste, keeping only a right to trees, or certain kinds of trees, in their own hands. Here, if it is desirable to effect a reservation of forest under State management, it has to be done under special provisions[1].

[1] These special cases will be fully dealt with in the sequel.